No. 87-636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES -- continued

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INTRODUCTION

Respondent Local 1263's opposition brief fails to adequately address the issues raised in the petition for certiorari.

I. THE FEDERAL CIRCUIT COURTS ARE COMPLETELY DIVIDED ON THIS ISSUE.

The union suggests that the question of whether the federal employee has a cause of action for breach of the duty of fair representation should not be addressed now because the circuit courts are not truly

divided on this issue. The union's position is simply not borne out by the decisions of the circuit courts.

A federal employee in the Fourth Circuit and the Tenth Circuit can apparently bring a cause of action in federal district court to redress a union's breach of the duty of fair representation. *Naylor v. American Fed'n of Gov't Employees, Local 446*, 580 F.Supp. 137 (W.D.N.C. 1983), *aff'd without opinion*, 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984); *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986). However, if the federal employee happens to be located in the Third Circuit, the Ninth Circuit, or the Eleventh Circuit, the district court will apparently dismiss the same case. *Wilson v. United States Bureau of Prisons*, No. 84- 5735 (3d Cir. 1985); *Karahalios v. Defense Language Inst.*, Nos. 85-1602, 85-1626, 86-2006 (9th Cir. 1987); *Warren v. Local 1759, American Fed'n of Gov't Employees*, 764 F.2d 1395 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985).

It is true, as the union points out, that one of the decisions upholding such a cause of action, *Naylor v. American Fed'n of Gov't Employees, Local 446*, 580 F.Supp. 137 (W.D.N.C. 1983), *aff'd without opinion*, 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984), is a decision without a reported opinion. It is also true that one of the decisions which dismissed the same cause of action, *Wilson v. United States Bureau of Prisons*, No. 84-5735 (3d Cir. 1985), is a decision without a reported opinion.

While the lack of reported opinions by these circuits is hardly dispositive of the issue, the diametrically opposed results in these cases present a good example of the completely confused state of the law in this area, and demonstrate the compelling need for this Court to settle the issue.

The union also asserts that the Tenth Circuit has changed its position in *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986), by its subsequent decision in *American Fed'n of Gov't Employees, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987). However, the union's assertion is incorrect.

The Tenth Circuit's reasoning in *American Fed'n of Gov't Employees, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987) is completely consistent with its opinion in *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986).

Both *American Fed'n of Gov't Employees, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987), and the case which it cites as authority, *National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C.Cir. 1986), emphasized that the Civil Service Reform Act of 1978, Fed'l Service Labor-Management and Employee Relations Statute, 5 U.S.C. Sections 7101 *et seq.*, "adopted for government employee unions the private sector duty of fair representation". *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1171 (D.C.Cir. 1986).

These cases simply stand for the proposition that the federal government union has the same duty of fair

representation as the private sector union. By the same token, the federal government employee should have the same ability to seek redress in the federal district courts when his union breaches that duty as the private sector employee has had since *Vaca v. Sipes*, 386 U.S. 171 (1967). The Tenth Circuit recognized in *Pham* that this case was simply a federal sector version of the *Vaca* problem, and found that there was no Congressional intent to deprive the federal sector employee from his *Vaca* remedy. 799 F.2d at 639. There is no indication of any sort in *American Fed'n of Gov't Employees, Local 916 v. FLRA*, *supra*, 812 F.2d 1326 (10th Cir. 1987), that the Tenth Circuit's opinion on this fundamental issue has changed in any respect whatsoever.

CONCLUSION

As Mr. Justice White noted in *Vaca*:

> "The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation." 386 U.S. at 183.

The federal circuit courts have been unable to reach a consensus on the issue of whether these same policy concerns apply to the federal government employee wronged by his union's actions.

This is a particularly appropriate case to review the issue because here there has been a factual finding by the district court that the union breached its duty of fair representation to petitioner on three different occasions.

There is no reason to wait for further confusion in the federal courts before this issue is squarely decided.

Respectfully submitted,

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